Supreme Court, U. S.
FILED
JAN 21 1980
MICHAEL RODAK, JR., CLERK

TO THE SUPREME COURT OF THE UNITED STATES

No. 79-1130

MICHAEL GEORGE THEVIS and
ANNA JEANETTE EVANS,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari

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TABLE OF CONTENTS

	Page
Jurisdictional Statement.....	1
Opinions Below.....	1
Jurisdiction.....	2
Questions Presented.....	2
Statement of the Case.....	2
Argument.....	8
Reason for Grant of Certiorari.....	12
Conclusion.....	13
Certificate of Service.....	14
Appendix.....	

TABLE OF CASES

	Page
Dunaway v. New York, ___ U.S. ____, 99 S.Ct. 2248 (1979).....	1, 2, 11, 12
Brown v. Illinois, 422 U.S. 590 (1975).	2, 9, 11
Brown v. Texas, ___ U.S. ____, 99 S.Ct. 2637 (1979).....	1
Massachusetts v. White, ___ U.S. ____, 99 S.Ct. 712 (1979).....	13
Morales v. New York, 396 U.S. 102 (1969).....	11, 12
Miranda v. Arizona, 384 U.S. 436 (1966).....	2, 9
United States v. Thevis, 469 F.Supp. 490 (1979).....	1, 9, 10, 12

JURISDICTIONAL STATEMENT

Opinions Below:

The opinion of the District Court was rendered on March 30, 1979, and is reported at 469 F.Supp. 490 (D. Conn.). This opinion and judgment was in the form of denial of motions by THEVIS and EVANS to suppress evidence and certain statements made by them. They then pled guilty, reserving their right to appeal, a practice approved in the Second Circuit.[1]

The Circuit Court affirmed "substantially for the reasons stated in Judge Clarie's excellent opinion ..." The Circuit Court further stated that it had considered *Dunaway v. New York*, (___ U.S. ____, 99 S.Ct. 2248 - June 5, 1979), and "heavily relied upon by appellant, and we do not believe that this decision requires a contrary result. *Cf. Brown v. Texas*, (___ U.S. ____, 99 S.Ct. 2637 - June 25, 1979)." [Opinion, Exhibit "A" to Appendix]

Thevis and Evans filed petitions for rehearing, and also suggestion of propriety of *en banc* consideration (Exhibit "B" to Appendix). This petition and this suggestion were denied on December 18, 1979 (Exhibits "C" and "D" to Appendix). Petition for stay of mandate has been filed.

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[1] See e.g., United States v. Rothberg, 480 F.2d 534, 535 (2d Cir., cert. den., 414 U.S. 856 (1973); United States v. Doyle, 348 F.2d 715, 719 (2d Cir. 1965); United States v. Faraolo, 506 F.2d 490, 491, n. 2 (2d Cir. 1975); United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. Coyne, 587 F.2d 111, 115 (2d Cir. 1978); United States v. Vanquez-Santiago, ___ F.2d ____, No. 78-1418 (2d Cir. July 12, 1979).

Jurisdiction:

This Court has jurisdiction to entertain this writ of certiorari under the provisions of 28 USCA 1254.

Questions Presented:

(1) Did the Circuit Court apply the proper test for considering the "legality of custodial questioning on less than probable cause for a full-fledged arrest"? *Dunaway v. New York*, ____ U.S. ____, 99 S.Ct. 2251 (1979).

(2) Was it proper to consider the admissibility of defendants' statements solely under *Miranda v. Arizona*, 384 U.S. 436 (1966), and without including consideration of *Brown v. Illinois*, 422 U.S. 590 (1975), that whether the making of such statements was rendered infirm by the illegal arrest?

Statement of the Case:

This is the chronology of the facts relevant to the issue here made:

On September 20, 1978, a man who identified himself as "Arby J. Evans" and who gave his address as 19 Hill Farm Road, Bloomfield, Connecticut, opened an account at the Bloomfield State Bank. On October 13, 1978, "Evans" transferred an additional $30,000.00 by mail from his account on a South Carolina bank. The State Bank feared "check-kiting", and decided not to honor the draft until it cleared.

The Bank President contacted the local police and the F.B.I. His apprehension was heightened because "Evans" had used a North Carolina driver's license as identification in opening the account, and the "starter" check was drawn on a South Carolina bank. He could find no telephone number for "Arby J. Evans" in Connecticut, or in North or South Carolina. The F B.I. reported back that there was an Arby J. Evans in Mebane, North Carolina, who had no known criminal record, and that Arby J. Evans had sufficient funds in the South Carolina bank. On October 24, 1978, the check cleared, and the Bloomfield State Bank credited the account of Arby J. Evans for the full amount (469 F.Supp. at 496).

On November 8, 1978, "Evans" came to the State Bank and requested a withdrawal, to be made on the following day at 9:30 a.m., of $31,000.00 in cash.

The Bank President was apprehensive that the "Evans" who was to withdraw the money might not be the "Evans" who owned the account. He again contacted the local police and F.B.I. The local police went to 19 Hill Farm Road. There was nobody at home, but they found a letter addressed to a person named Rifkind. The local post office revealed, upon inquiry by the Bank, that "Evans" had received mail from the Connecticut Bank & Trust Company (of Bloomfield). That Bank informed the State Bank that "Evans" had an account there, from which he was to withdraw $55,000.00 on November 9, 1978.

The testimony did not show whether or not the correspondence from the Connecticut Bank & Trust Company to "Evans" was addressed to him at 19 Hill Farm Road; but the local police officers learned, on the afternoon of November 8, 1978,

from a director of the State Bank who resided on Hill Farm Road, that "Evans" had in fact purchased this property from the Rifkinds. F.B.I. Agent Foster was apparently not given this information.

The information that "Evans" proposed to also withdraw $55,000.00 from the other bank "just looked funny" to Bank President Gozzo "even if it belonged to him" (Tr. 630). There was no other suspicion of these withdrawals (Tr. 631).

Bank President Gozzo, the local police, and F.B.I. Agent Foster arranged to meet at the Bank prior to the time "Evans" got there the following morning at 9:30 to pick up his money. They planned to have Gozzo take "Evans" into his private office to wait for the money to be counted. The officers would interrogate him as to his identity while Gozzo ostensibly left to get the money (Tr. 627).

"Evans" arrived at the Bank at 9:20 a.m., filled out the withdrawal check, and provided identification. Pursuant to the prior plan, "Evans" was taken into the bank president's office, the door was closed, president Gozzo left, and "Evans" was confronted by two local police officers and Agent Foster of the F.B.I., who identified themselves (Tr. 642).

"Evans" expressed surprise that the F.B.I. officer was there and asked "Do I need an attorney?" (Tr. 643). He asked if the problem was that the check had not cleared, and Foster replied that, whether it had or not, there were questions as to his identity. Foster's prior investigation (above) had shown that there was an Arby J. Evans in Mebane, North Carolina. He asked "Evans" for suggestions of someone from there who would vouch for his identity, but "Evans" declined to do so.

Officer Beatty told Foster that Arby J. Evans was a personal friend of the Mebane (North Carolina) Town Manager, Virginia Whitfield. Foster asked "Evans" if he knew the town manager, and his reply referred to the manager as a *man* rather than a *woman* (Tr. 129). The police placed a call to her and handed the 'phone to "Evans" so that he might speak to her. After "Evans" returned the receiver to Beatty, Mrs. Whitfield stated to Beatty that this was not the Arby J. Evans she knew. It was then about 9:40 a.m.

Bank President Gozzo went outside while the officers were questioning "Evans", and telephoned his office that there was a lone female in a car parked in the bank parking lot, and that the car had South Carolina registration plates. This was at approximately 9:45 a.m. Foster and Beatty left "Evans" with Officer Toce and went to the vehicle. The woman was in the driver's seat. Foster and Beatty identified themselves and asked to see her driver's license. She produced a Georgia license in the name of Anna Jeanette Evans. Foster asked if she were related to a man inside the bank. She stated that she was alone, knew no one in the Bank, and knew no person named Arby J. Evans, even though Foster told her that Mr. Evans had a bank account in South Carolina, their names were the same, and the car had South Carolina license plates (Tr. 139). Beatty asked for the car's registration, which she did not produce. When Foster further pressed her on the similarity of their names, she admitted that she knew him, stating that she had come from her home in Atlanta two weeks previously for a "fling" and met him in a saloon in Charleston, South Carolina. When Foster observed that Atlanta, rather than Charleston, might be a more credible situs for "action", she changed her story and said that the man in the bank was her husband of eight years.

Foster, noticing luggage in the rear seat of the car, asked Evans if it were hers, and she responded that it was. Some of the luggage bore the initials "J.E.", but others had Eastern Airlines stick-on name tags of "Sally Green". Foster asked her who Sally Green was, and she declined to answer further questions (Tr. 143). Foster then asked her to go with them to the Bank.

After Foster and Beatty had left for the parking lot, Officer Toce asked "Evans" for further identification, and after receiving his wallet, looked at various things in it and began to copy information therefrom; whereupon "Evans" told him he had no right to do this, and took his wallet back (Tr. 794).

Foster and Beatty took Jeanette Evans to the Bank into the presence of Toce and "Arby J. Evans". He stated "I'm sorry that I had to involve you as my sister", and she agreed that she was, but said that she had been nervous and had told the officers that she was his wife. Foster continued questions regarding their relationship, her identification, and the names of her children, etc. This continued for five or ten minutes, at which time "Arby J. Evans" asked if they were under arrest. Foster replied that they were not, but that they were not free to leave (Tr. 660); and that all would have to go to the Bloomfield Police Station, where they arrived about ten o'clock.

Questioning of defendants continued at the Bloomfield Police Station, regarding their identity, their purpose in Bloomfield, the sources of their money, their plans of employment, etc. (Tr. 40). The police obtained from the Mebane Town Manager the telephone number of Mrs. Arby J. Evans of Mebane, North Carolina, and called her outside defendants' presence, informing her that they would like her help in identifying a man and woman they were holding. They then asked "Evans"

if he would speak to the real Mrs. Evans, to which he agreed (Tr. 159). When asked his identity, she said she was too upset, and hung up (Tr. 160). The officers made a similar call to one Jimmy Jobe of Mebane, who stated that the person speaking to him was not Arby J. Evans of Mebane (Tr. 51, 52).

At approximately 10:20 defendant "Arby J. Evans" demanded an attorney. From 10:20 to 10:45, Foster learned that the car occupied in the parking lot by Anna Jeanette Evans had been purchased from the dealer whose sticker was on the vehicle by one "Arby J. Evans".

At approximately 2:00 o'clock p.m., Foster received word from another F.B.I. agent that "Arby J. Evans" might in fact be Michael G. Thevis. Foster procured a "wanted" poster and confronted him with it, whereupon he admitted that he was Michael George Thevis.

Foster asked if explosive devices were in the car but Thevis informed him that there was nothing in the car that would hurt anyone; that there was only half a million dollars in cash and a million in jewelry.

The officers demanded the keys to the car, and another F.B.I. officer drove it to the Federal Building.

ARGUMENT

The "Statement of Facts" of the opinion regarding grounds of suspicion are convoluted:

It includes as grounds of suspicion for detention of November 9, 1978, those which had been dispelled when the $30,000.00 check of October 13, 1978, had proved good on October 24, 1978, when the bank credited his account in full (469 F.Supp. at 495, 496). The chronology is incorrect: It includes Gozzo's learning that "Evans" did not live at 19 Hill Farm Road [which (erroneous) information was not furnished until November 8, 1978] with that received on October 13, 1978, regarding the fact that this $30,000.00 "starter" check was drawn on a South Carolina bank and his failure to find a telephone number for "Evans", and the F.B.I. investigation thereof between October 13 and October 24, 1978 (469 F. Supp. at 496).

The fact resume of check-kiting methods and Thevis' identification of himself as Arby J. Evans, when in fact he was "one of the FBI's ten most-wanted fugitives" over-sensationalizes and discolors the actual facts known as a basis of suspicion: The prior F.B.I. investigation had dissipated suspicion of check-kiting. The $30,000.00 check had been signed by the owner of the account. There was not even any pretense that the $31,000.00 check signed by "Arby J. Evans" to withdraw the cash on November 9, 1978, was not the same signature as that on the check which deposited the $30,000.00 and the $3,000.00 initial deposit. The actual iniquity here claimed is that Thevis handled his money under a name other than his own. His identity as "one of the FBI's ten most wanted" was not suspected until hours after his arrest.

The District Court decision (adopted by the Circuit Court) discussed the principle of "probable cause to arrest" under *Terry* and subsequent cases (469 F.Supp. 500-505) separately and distinctly from its discussion of "admissibility of defendants' statements" under *Miranda* (469 F.Supp. 505-509). The opinion did not recognize the principle of *Brown v. Illinois*, 422 U.S. 590 (1975), that *Miranda* warnings themselves "do not alone sufficiently deter a Fourth Amendment violation" (422 U.S. at 601); *Dunaway v. New York*, ___ U.S. ____, 99 S.Ct. at 2258-2259 (1979). The opinion itself was divided accordingly, and the two concepts discussed as if unrelated.

This calculated structure of the opinion indeed encapsulates Fourth and Fifth Amendment rights independently and separately without any hint that the Fifth is only a "'threshold requirement' for Fourth Amendment analysis". *Brown*, above, 422 U.S. at 604; *Dunaway*, above, ___ U.S. ____, 99 S.Ct. at 2259.

One illustration is this: When the police asked "Arby J. Evans" (Thevis) if he knew the Town Manager of Mebane, North Carolina, his response that he knew "him" (actually a *Mrs.* Whitfield) was held inadmissible "in assessing probable cause" (469 F.Supp. at 504, n. 2). However, his telephone conversation with this town manager, contrived by the officers to demonstrate this same falsity, was held admissible under *Miranda* and its progeny (469 F.Supp. at 507).

"(T)he *MIRANDA* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Brown*, 422 U.S. at 603 (Div. 5 of opinion).

Then, in applying the "probable cause to arrest", a "balancing" test was applied which over-emphasized the *Terry* concept:

"The rationale *[Terry]* ... is not limited to situations where police officers have reason to believe the individual may be armed" (469 F.Supp. at 500).

"The reasonableness of the officers' conduct must be measured by *balancing* the need for the stop against the gravity of the invasion of personal security..." (469 F.Supp. at 501) (emphasis added).

"(A)sking Thevis to step into the bank president's office in order to confirm his identity was a very *minimal intrusion*" (469 F.Supp. at 501) (emphasis added).

"The facts known to the officers on the morning of November 9, 1978, when Thevis first entered the bank were certainly sufficient to justify a *brief detention* for the purpose of establishing his identity" (469 F.Supp. at 501) (emphasis added).

"As with another defendant who was held to have been subjected to a *Terry-style stop* rather than a full arrest, she was 'politely requested to accompany the officers to a private room ..." (469 F.Supp. at 502) (emphasis added).

"(T)he officers' *brief investigatory stop* even when there was no probable cause to believe that a crime had been committed, the *Terry* court did not intend that the police could circumvent the probable cause requirement *completely* ...." (469 F.Supp. at 503) (emphasis added).

The opinion classified the officer's interrogation of defendant *Evans* in the parking lot as only a *Terry*-type, non-custodial, stop. (469 F.Supp. at 506, Divs. 19-20): "'(c)ustody' and 'arrest' are separate and discrete concepts. One may be in custody for *Miranda* purposes - that is, not free to leave - and still be in a state of detention which rises only to the level of a *Terry* stop rather than a full arrest. The Supreme Court, in *Morales v. New York*, 396 U.S. 102 (1969), by deciding the case on a narrower ground, avoided grappling with the 'question of the legality of custodial questioning on less than probable cause for a full-fledged arrest'. *Id.*, at 105-106). The issue is presently pending before the Supreme Court in *Dunaway v. New York* ...." (*Id.*, note 6, p. 506).

When the Circuit Court adopted this opinion it added only that it was not inconsistent with *Dunaway* (___ U.S. ____, 99 S.Ct. 2248).

Based upon the foregoing, the concept of isolating the Fourth Amendment is so contrary to *Brown* and *Dunaway* (above) that it requires consideration.

The search warrants, also held to be valid, are considered independently. If *Brown*, *Dunaway*, and their precursors have the meaning argued above by petitioners, this is improper.

REASON FOR GRANT OF CERTIORARI:

In adopting the opinion of the District Court, the Circuit Court adds only that it is not inconsistent with *Dunaway*.

Several factors suggest the propriety of a closer look at the District Court opinion:

(1) It was rendered prior to this Court's decision in *Dunaway*.

(2) The format of the opinion was a rigid adherence to separate consideration of "probable cause to arrest" (469 F.Supp. 500-505), "admissibility of defendants' statements" (469 F.Supp. 505-509), and "admissibility of evidence received" (469 F.Supp. 509-512). This, together with the great emphasis in the opinion of *Terry* ("Argument", above), reflects inadequate consideration of the connection and interdependence of Fourth and Fifth Amendment rights further explained in *Dunaway*, and particularly in Part III, ___ U.S. ____, 99 S.Ct. 2258, et seq.

(3) The expression that a person might be "in a state of detention which rises only to the level of a *Terry* stop, rather than to a full arrest" and its reliance upon *Morales v. New York*, 396 U.S. 102, as presenting only a narrow ground (469 F.Supp. at 506, note 6) does not update to the *Dunaway* explication.

(4) The conclusion that *Massachusetts v. White*, ___ U.S. _____, 99 S.Ct. 712 (1979), yet left open the question of whether tainted allegations in the warrant affidavit might be used to establish probable cause to search (469 F.Supp. at 511, note 17) is an inadequate consideration of the *Dunaway* explication of the connection between Fourth and Fifth Amendment rights.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari for review, upon the questions presented.

Respectfully,

COOK & PALMOUR,

Attorneys for Petitioners

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CERTIFICATE OF SERVICE

I have served the foregoing application for writ of certiorari with Appendix upon the United States, by mailing three signed copies of same to Mr. Wade H. McCree, Solicitor-General, Department of Justice, Room 5614, Washington, D.C. 20530, and by mailing a copy of same to Mr. Richard Blumenthal, United States Attorney, 270 Orange Street, New Haven, Connecticut 06510.

This 17 day of January, 1980.

Counsel for Petitioners

APPENDIX

EXHIBIT "A"

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of November, one thousand nine hundred and seventy-nine.

Present:

Honorable Wilfred Feinberg
Honorable Walter R. Mansfield
Circuit Judges
Honorable Jacob Mishler
Ch. District Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- MICHAEL GEORGE THEVIS and ANNA JEANETTE EVANS, Defendants-Appellants	)	79-1251 79-1255

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED substantially for the reasons stated in Judge Clarie's excellent opinion, reported at 469 F. Supp. 490 (D. Conn. 1979). We have considered Dunaway v. New York, 47 U.S.L.W. 4635 (U.S. June 5, 1979) decided after the district court's opinion and heavily relied upon by appellant, but we do not believe that this decision compels a contrary result. Cf. Brown v. Texas, 47 U.S.L.W. 4810 (U.S. June 24, 1979).

/s/ Wilfred Feinberg
WILFRED FEINBERG

/s/ Walter R. Mansfield
WALTER R. MANSFIELD,
Circuit Judges

/s/ Jacob Mishler
JACOB MISHLER, Ch. District Judge

APPENDIX

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	)	
PLAINTIFF-APPELLEE	)	
v.	)No. 79-1251	
ANNA JEANETTE EVANS,	)	
DEFENDANT-APPELLANT	)	Consolidated
	)	on
UNITED STATES OF AMERICA,	)	Appeal
PLAINTIFF-APPELLEE	)	
v.	) No. 79-1255	
MICHAEL GEORGE THEVIS,	)	
DEFENDANT-APPELLANT	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING, AND
SUGGESTION OF PROPRIETY OF
HEARING EN BANC

Defendants-Appellants Evans and Thevis petition this Court for rehearing in the above-stated appeals; and respectfully suggest that it

would be appropriate that the Court as a whole consider the matter:

(1) This Court has misapprehended the Supreme Court decision in *Dunaway v. New York*, ____ U.S. _____, 99 S.Ct. 2248 (1979), which it cited in its opinion.

This Court's opinion held that "...(W)e do not believe that this decision *(DUNAWAY)* compels a contrary result. *Cf. Brown v. Texas*, 47 U.S.L.W. 4810 (U.S. June 24, 1979)."

This Court affirmed for the reasons stated by the District Court.

The District Court opinion (accepted by this Court) is contrary to *Dunaway* because it failed to recognize *Dunaway's* restricted interpretation of *Terry v. Ohio*, 392 U.S. 1 (1968) and *Brown v. Illinois*, 422 U.S. 490 (1972); and the enunciation of the question reserved in *Morales v. New York*, 396 U.S. 102 (1969), *e.g.*, "the question of the legality of custodial questioning on less than probable cause" (*Dunaway*, ____ U.S. ____, 99 S.Ct., at 2251).

"(T)he rationale of those cases (*Terry* and *Adams*) is not limited to situations where police officers have reason to believe that the individual may be armed." (Distr. Ct. Op., 469 F.Supp. at p. 500).

"The reasonableness of the officer's conduct must be measured by balancing the need for the stop against the gravity of the invasion of personal security entailed by the stop..." (469 F.Supp at p. 501)

The District Court opinion continues to reiterate the *Terry-Adams* concepts of "brief detention", "minimal intrusion", "*Terry*-style stop", "brief investigatory stop", and partial circumvention of probable cause requirements (*e.g.*, "The *Terry* court did not intend that police could circumvent the probable cause requirement *completely*" - emphasis ours) [Opinion, 469 F.Supp., at pp. 501, 502, 503]

"(T)he police conduct at issue here involved a proper progression of escalating responses to circumstances which generated a mounting degree of suspicion that a crime had occurred." (469 F.Supp. at 505)

The foregoing concepts are the core of the affirmance. They are contrary to *Dunaway:*

Prior to *Terry*,

"The standard (probable cause) applied to all arrests, without the need to 'balance' the interests and circumstances involved." ____ U.S. _____, 99 S.Ct. at 2254.

Terry approved a brief stop "only for the purpose of a pat-down for weapons" and subsequent cases were in the same category. *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2255-56.

"Respondent State now urges the Court to apply a balancing test, rather than the general rule, to custodial interrogations, and to hold that 'seizures' such as that in this case may be justified by 'reasonable suspicion'." *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2256.

"(R)espondents urge us to adopt a multi-factor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests." *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2257.

"(T)he police conduct in *Brown* fits equally the police conduct in this case: ... The detectives embarked upon this expedition for evidence in the hope that something might turn up ... 95 S.Ct. at 2262...." *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2258.

The decision is also contrary to *Dunaway* and to *Brown* (below) in that it confined the "admissibility of statements" to Fifth Amendment concepts, and did not consider the applicability of the Fourth Amendment thereto. *Thevis*, 469 F.Supp. at pp. 505-509, discussing *Miranda* and its progeny.

"The Court, in other words, appears to have held that the *Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible as long as, in the traditional sense, it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments." *Brown v. Illinois*, 422 U.S. 590, 597 (1975).

The District Court decision here was actually divided into two separate subjects: "1. Probable cause to arrest" (469 F.Supp. 500, et seq. - the Fourth Amendment question) and "2. Admissibility of defendants' statements" (469 F.Supp. 505, et seq. - the Fifth Amendment question).

Neither division of the opinion considered the coalescence of Fourth and Fifth Amendment rights.

"(A)lthough a confession after proper *Miranda* warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis *(Brown)*, 422 U.S. at 604, 95 S.Ct. 2262." *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2259.

(2) The Court's opinion is not attenuated to the facts in the case:

The opinion of the District Court separated the facts it deemed applicable to "probable cause for arrest" (469 F.Supp. 500-504 - the Fourth Amendment question) from those it deemed applicable to "Admissibility of Defendants' Statements" (469 F.Supp. 505-509 - the Fifth Amendment question) (above). This separation of facts disregards chronology as well as integration. It is almost as if the Court were considering two separate cases. This factual re-casting is not only inconsistent with the *Dunaway* conclusion of their potential relationship (above); it is an artificial reconstruction, because the facts and events of the case were closely interrelated. The isolation and classification of these various facts for purposes of separately considering Fourth and Fifth Amendment rights is not attenuated to the fact structure. It is only a convenient way of making a (separate) Fourth and Fifth Amendment prognosis.

The opinion views Thevis' identity as one of the "ten most wanted" by the FBI; and of the large amount of cash involved in a bank transaction, as such sensational facts as would excuse a lack of

probable cause. However, neither fact had any relationship to the charge of possession of illegal weapons, which was the basis of the motions to suppress; and in fact, the police already knew that the bank transaction itself was free from criminal taint.

Respectfully,

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APPENDIX

EXHIBIT "C"

United States Court of Appeals
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of December, one thousand nine hundred and seventy-nine.

Present:
HONORABLE WILFRED FEINBERG
HONORABLE WALTER R. MANSFIELD
Circuit Judges
HONORABLE JACOB MISHLER
District Judge

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	79-1251
	)	79-1255
ANNA JEANETTE EVANS,	)	
MICHAEL GEORGE THEVIS,	)	
Defendants-Appellants.	)	
	)	

A petition for a rehearing having been filed herein by counsel for the Appellants.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro
Clerk

APPENDIX

EXHIBIT "D"

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of December, one thousand nine hundred and seventy-nine.

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. 79-1251
79-1255

ANNA JEANETTE EVANS,
MICHAEL GEORGE THEVIS,

Defendants-Appellants.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge

Supreme Court, U. S.
FILED
MAR 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1130

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL GEORGE THEVIS AND ANNA JEANETTE EVANS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	11
Conclusion	16

CITATIONS

Cases:

Brown v. *Illinois*, 422 U.S. 590 ..... 11, 12, 15
Brown v. *Texas*, No. 77-6673 (June 25, 1979) 12
Dunaway v. *New York*, 442 U.S. 200 ..... 11, 13, 14
Terry v. *Ohio*, 392 U.S. 1 ..... 9, 12, 13, 14
United States v. *Brignoni-Ponce*, 422 U.S. 873 12
United States v. *Dionisio*, 410 U.S. 1 13
United States v. *Euge*, No. 78-1453 (February 20, 1980) 13
United States v. *Wade*, 388 U.S. 218 13
Wong Sun v. *United States*, 371 U.S. 471 15

Constitution and statutes:

United States Constitution:

Fourth Amendment 11, 12, 14, 15, 16
Fifth Amendment 10, 14, 16

18 U.S.C. 494 2
18 U.S.C. 1072 2
18 U.S.C. App. 1202 2

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. i-ii) is not reported. The opinion of the district court is reported at 469 F. Supp. 490.[1]

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[1] Petitioners failed to append the opinion of the district court to their petition, as required by Sup. Ct. R. 36(1). For the convenience of the Court, we have lodged ten copies of the opinion with the Clerk.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1979. A petition for rehearing was denied on December 18, 1979 (Pet. App. ix-xii). The petition for a writ of certiorari was filed on January 21, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether statements uttered during the course of petitioners' detention should have been suppressed as evidence.

2. Whether a warrant authorizing the search of petitioners' automobile was supported by probable cause.

STATEMENT

Following indictment in the United States District Court for the District of Connecticut, petitioner Thevis pleaded guilty to one count of possessing a false passport, in violation of 18 U.S.C. 494, and one count of unlawfully possessing firearms, in violation of 18 U.S.C. App. 1202. Petitioner Evans pleaded guilty to one count of harboring an escaped federal prisoner (petitioner Thevis), in violation of 18 U.S.C. 1072. Thevis was fined $5,000 and sentenced to two years' imprisonment, to run consecutively to sentences imposed on unrelated offenses.[2] Evans was sentenced to

[2] On April 28, 1978, Thevis escaped from a federal penitentiary in Indiana where he was serving a sentence as a result of a 1974 federal obscenity conviction and a 1975 federal racketeering conviction, both of which occurred in the Northern District of Georgia. In January 1979 Thevis received a four-year sentence in the Southern District of Indiana as a result of his conviction on escape charges, to be served consecutively to the sentences he was serving at the time of his escape. The instant sentence is to be served consecutively to Thevis's sentence for escape.

18 months' imprisonment, all but 90 days of which was suspended, to be followed by three years' probation. Petitioners, having reserved the right to do so, appealed the district court's denial of their motions to dismiss the indictments and its denial in part of their motions to suppress (469 F.Supp. 490). The court of appeals affirmed substantially for the reasons stated in the opinion of the district court (Pet. App. i-ii).

1. The evidence presented at a suppression hearing showed that on September 20, 1978, petitioner Thevis, using the name "Arby J. Evans," opened a savings account at the Bloomfield State Bank in Connecticut by depositing $3,000 in cash. He informed the bank that he had a post office box and that his street address was 19 Hill Farm Road (Tr. 116, 513-514, 524).[3]

On October 13, 1978, the Bloomfield State Bank received through the mail a $30,000 check for deposit into the "Arby J. Evans" account (Tr. 509-510). Because the check was a "starter check" drawn on a newly opened account in the name of "A. J. Evans" at a South Carolina bank, bank personnel became

[3] "Tr." refers to the transcript of the motions hearing in district court.

suspicious (Tr. 510, 513, 525). The bank president, Joseph Gozzo, examined the signature card of the account and found that a North Carolina driver's license had been used as identification in opening the account (Tr. 513-514). Gozzo could find no listing for Arby J. Evans in the local telephone directory or through directory assistance in either North Carolina or South Carolina. He also determined that there was no "A. J. Evans" on Hill Farm Road (Tr. 515). Fearing a check kiting operation, Gozzo contacted the Bloomfield Police Department (Tr. 521).

On November 8, 1978, "Arby J. Evans" informed the bank that he was coming in at 9:30 the following morning to withdraw $31,000 from his account, in cash, that he wanted the money in a paper bag, and that he did not need to count it (Tr. 526-527).

Fearing that the "A. J. Evans" who was coming into the bank the following day might not be the owner of the funds (Tr. 534),[4] Gozzo went to 19 Hill Farm Road that afternoon and learned that the house at that address was owned by a party named Rifkind (Tr. 536).[5] Moreover, Gozzo made contact with the Bloomfield Branch of the Connecticut Bank and Trust Company and learned that "A. J. Evans" maintained $55,000 in an account at that bank and had also ad-

[4] The $30,000 check had cleared, so the account contained sufficient funds to cover the withdrawal (Tr. 518-519).

[5] The FBI later learned that petitioner was in fact living at that address, but this information was not communicated to the detaining officers until after petitioner had been arrested (469 F. Supp. at 496).

vised them that he intended to withdraw that sum in cash from that bank on November 9, 1978 (Tr. 539-540). Gozzo again called the Bloomfield Police Department and advised Deputy Chief Toce of all that he had learned (Tr. 540-541). Toce called FBI Special Agent Richard Foster (Tr. 28), and they made plans to be at the bank the following morning.

The next day, at about 9:30 a.m., petitioner Thevis came to the Bloomfield State Bank and identified himself as Arby J. Evans (Tr. 29-30). A bank employee advised Thevis that Gozzo wanted to talk with him prior to the withdrawal, and he directed Thevis to Gozzo's office (Tr. 550-551). There Gozzo asked for identification; petitioner gave him a driver's license in the name of "Arby J. Evans" and several credit cards (Tr. 551-553). At this point, Special Agent Foster (Tr. 553), Deputy Chief Toce, and Officer Thomas Beatty, who were in the office, introduced themselves to Thevis as law enforcement officers (Tr. 30). Gozzo then left his office.

Foster informed Thevis that he could have an attorney if he wanted one (Tr. 787-789). Petitioner did not ask for an attorney, nor did he express an unwillingness to speak with Foster and the other officers (469 F. Supp. at 497). Agent Foster explained that Thevis was not charged with any crime and that the bank simply wanted to be sure that he actually was "Arby J. Evans" (Tr. 116-120).

Officer Beatty had previously learned from authorities in North Carolina that the real "Arby J. Evans" was a personal friend of Mrs. Virginia Whit-

field, the Town Manager of Mebane, North Carolina (Tr. 31). The officers then placed a telephone call to Mrs. Whitfield's office in order to afford Thevis the opportunity to speak with her (*ibid.*). After Thevis spoke to Mrs. Whitfield, she informed Beatty that the person with whom she had just spoken was definitely not Arby J. Evans (Tr. 32).

At about this same time, Foster was advised by telephone that a maroon and silver 1979 Chevrolet with South Carolina license plates was parked in the parking lot, loaded with luggage. When Foster and Beatty approached the car, petitioner Evans was seated behind the steering wheel (Tr. 34-35); she deliberately avoided acknowledging their presence until Foster tapped on the window (Tr. 35). Foster and Beatty immediately identified themselves and displayed their credentials (Tr. 35-36). In response to Foster's request to see Evans' driver's license, she produced a Georgia operator's license in the name of Anna Jeanette Evans (Tr. 36). Foster asked Evans what relationship, if any, she had with the man in the bank (Tr. 35-36). Evans replied that she had come to the bank alone, that she knew no one by the name of Arby J. Evans, and that she knew no one inside the bank (Tr. 36).

Foster advised her that a man in the bank with a name similar to hers had an account in South Carolina, the same state in which her car was registered. Officer Beatty then asked her for the car's registration, which she could not produce (Tr. 139). When Special Agent Foster again commented on the similarity of names and geography, Evans admitted knowing petitioner Thevis, stating that he was a salesman whom she had met two weeks earlier in a Charleston, South Carolina, saloon (Tr. 36, 141). She said that she did not know the nature of the business that had brought "Arby Evans" to the bank; that she had just come up to Connecticut "for a fling" (Tr. 141); and that she had originally traveled from Atlanta to Charleston for some "action" (Tr. 142). When Foster commented that people desiring "action" would be more likely to leave Charleston for Atlanta, Evans claimed that the man in the bank was really her husband (Tr. 142-143).

Asked who owned the luggage in the back seat of the car, Evans replied that it was hers and that no one else was traveling with her and "Arby." Foster, however, observed in plain view through the car window that some of the luggage bore tags with the name "Sally Green." When Foster then asked who Sally Green was, Evans stated for the first time, "I don't want to answer any more questions at this time" (Tr. 143). She then acceded to Foster's request that she accompany him into the bank.

When Foster, Beatty, and Evans entered the bank, petitioner Thevis said, "I'm sorry I had to involve you as my sister." Evans then changed her story again, stating that she really was Thevis's sister. Five or ten minutes later, Agent Foster took petitioners to the Bloomfield police station (Tr. 39).

At the police station, the officers learned of a check theft and forgery ring that was operating in the area

of Mebane, North Carolina, and they learned that the description of some of the individuals involved fit petitioners. At approximately 10:20 a.m., Thevis first stated that he would like an attorney, and he thereafter secured the assistance of two attorneys (Tr. 42-49). During this period neither petitioner was interrogated (Tr. 44, 49).

At approximately 1:55 p.m., Agent Foster was informed by the Hartford office of the FBI that the man claiming to be "Arby J. Evans" actually might be Michael George Thevis, one of the FBI's ten most wanted fugitives. Upon learning this, Foster obtained a file of FBI "Wanted Posters" from Officer Beatty, located the flyer for petitioner Thevis, and displayed it to Thevis and his attorneys (Tr. 56).

In the presence of counsel, petitioner admitted he was Michael George Thevis (Tr. 56). Foster read the wanted poster to Thevis and his attorneys (*ibid.*), including the allegation that Thevis was known to use explosive devices and should therefore be approached cautiously (Tr. 57). Foster asked Thevis whether there was anything in the car that would explode when the automobile was searched, specifically inquiring, "What am I going to find?" (*ibid.*). Thevis replied, "About five hundred and sixty-one or two thousand dollars to be exact * * * [and] [a]bout a million in jewelry" (Tr. 57-58).

Thevis and Evans were later transported to the FBI office in Hartford and were there advised of their constitutional rights (Tr. 60, 64). Thereafter Thevis admitted that he had escaped from federal custody,

saying, "It wasn't really much of an escape. I just walked out the back door and kept going" (Tr. 62). During the late afternoon and evening hours of November 9, 1978, agents of the FBI obtained and executed a warrant to search the Chevrolet that petitioners had occupied. In it they found seven handguns, a false passport, approximately $412,000 in cash, and a large quantity of jewelry (469 F.Supp. at 510).

2. Prior to their plea hearing, petitioners moved to suppress all statements and physical evidence secured by the police subsequent to the time that Thevis entered the bank president's office. The district court, in a comprehensive opinion (469 F.Supp. 490-516), granted in part and denied in part petitioners' motions. The court found that the detention of Thevis in the bank was a lawful investigatory stop to ascertain his true identity and was based on a reasonable suspicion that he might be attempting to defraud either the bank or another innocent party. *Id.* at 501-505. The court nevertheless suppressed all statements made by Thevis while in the bank president's office as the product of a custodial interrogation unaccompanied by *Miranda* warnings. The court did, however, rule admissible Thevis's telephone conversation with the Mebane town manager, on the ground that it was not "testimonial" in nature but was merely voice identification. *Id.* at 505-507.

As to Evans, the court held that the questions directed at her in the parking lot were reasonable and lawful under *Terry* v. *Ohio*, 392 U.S. 1 (1968), and that her responses were admissible evidence. 469 F.

Supp. at 502. The court ruled that she was not in custody until she was taken from the car to the bank. It therefore suppressed those statements made by Evans in the bank in response to interrogation, although it held admissible her spontaneous conversation with Thevis concerning their contrived sibling relationship. *Id.* at 506-507.

The officers did not formally arrest petitioners at the time they moved them from the bank to the police station, but the district court found that at that point the officers had probable cause to believe that "Thevis was about to defraud either the two banks or the real Arby J. Evans of a total of $86,000," and that petitioner Evans was "a part of the scheme." 469 F. Supp. at 504. It therefore found the further detection lawful. The court further ruled that Thevis's statements, made in the presence of counsel, admitting his identity and his prison escape and divulging the contents of his car, were voluntary, intentional, and knowing waivers of his Fifth Amendment privilege. *Id.* at 508. As to the search of the Chevrolet, the court found that it was proper because it was made pursuant to a warrant based on probable cause, and, alternatively, that it was valid as an inventory search of an automobile in the custody of the FBI. *Id.* at 509-510.[6]

[6] Petitioner Evans also challenged the search of Thevis's wallet, a post office box, and two safe deposit boxes. The court held that she had no standing to contest the search of Thevis's wallet. The remaining searches, the court held, were all conducted pursuant to valid warrants issued on probable cause. 469 F. Supp. at 510-513.

The court of appeals affirmed for the reasons stated in the district court's opinion and rejected petitioners' suggestion that *Dunaway* v. *New York*, 442 U.S. 200 (1979), required a different result (Pet. App. i-ii).

ARGUMENT

1. Relying on *Dunaway* v. *New York*, 442 U.S. 200 (1979), and *Brown* v. *Illinois*, 422 U.S. 590 (1975), petitioners essentially contend (Pet. 8-12) that they were detained by officers in violation of the Fourth Amendment and that statements made by them subsequent to those detentions, some before and some after the issuance of *Miranda* warnings, were erroneously ruled admissible against them by the district court. In particular, petitioners rely on the principle established in *Brown*, and reaffirmed in *Dunaway*, that *Miranda* warnings, by themselves, do not automatically serve to break the causal connection between an illegal detention and statements subsequently made by the one detained.

These contentions are without merit because the district court, affirmed by the court of appeals, correctly concluded (1) that the initial detention of Thevis in the bank office was the equivalent of a lawful investigatory stop; (2) that Evans was not in custody at all until she was asked to accompany the officers into the bank; and (3) that probable cause existed to believe petitioners were collaborating in a fraud once Evans was brought into the office and exchanged opening remarks with Thevis. Because the district court was correct in its conclusion that peti-

tioners' detention was at all times supported either by a reasonable suspicion or by probable cause, and therefore was lawful, the court had no reason, as petitioners contend (Pet. 9), to consider whether their statements should have been suppressed as the fruit of an illegal arrest. See *Brown* v. *Illinois*, *supra*. In any event, the court suppressed all statements made by petitioners in either the bank or the police station that were not preceded by *Miranda* warnings, with the exception of statements made spontaneously (rather than in response to questioning) and statements made in the presence of counsel.

a. The detention of petitioner Thevis at the bank was a lawful investigatory stop supported by reasonable suspicion and hence consonant with the dictates of the Fourth Amendment. The detaining officers knew that a man using the name "Arby J. Evans" was planning to withdraw $86,000 from new accounts at two banks on the same day and that "Evans" wanted the cash in a paper bag and did not care to count it. They also knew that "Evans," who displayed a North Carolina driver's license, had deposited money in the Connecticut bank by using a starter check drawn on a South Carolina bank and that "Evans" appeared to give a false local address. These specific articulable facts warranted a brief detention for the purpose of ascertaining whether petitioner was indeed "Arby J. Evans." See *Brown* v. *Texas*, No. 77-6673 (June 25, 1979), slip op. 3-5; *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968). As

the court observed (469 F.Supp. at 501), the mere fact that the starter check had cleared did not place petitioner Thevis above suspicion. The officers still had reason to believe that Thevis was not the real "Arby J. Evans," but was attempting to defraud that person of large sums of money. When the Mebane town manager informed the officers that Thevis was not Arby J. Evans, their suspicions that Thevis was masquerading under a false name were confirmed.

The brief detention of Thevis in the bank manager's office to establish his entitlement to the funds he was attempting to withdraw before they were given to him is quite unlike the detention found unlawful in *Dunaway*, *supra*; for there the police took the defendant to the police station without probable cause, issued *Miranda* warnings, and then interrogated him for several hours. (We note that this Court in *Dunaway* reaffirmed the lawfulness of a *Terry* stop followed by reasonable inquiries. *Dunaway* v. *New York*, *supra*, 442 U.S. at 208-211.) In any event, as noted above, the district court here suppressed all of Thevis's uncounseled responses to police interrogation prior to the issuance of *Miranda* warnings at the FBI office,[7] and as we show below (pages

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[7] Thevis's telephone conversation with the Mebane town manager was ruled admissible not for its substance, but only as a means of voice identification—Thevis' voice was identified as being different from that of Arby J. Evans. *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Wade*, 388 U.S. 218 (1967). See also *United States* v. *Euge*, No. 78-1453 (February 20, 1980). On the other hand, the court suppressed Thevis's response to the police officer that he

14-15), the officers' reasonable suspicion had ripened into probable cause well before that time.

b. The district court was also correct in concluding that petitioner Evans was not "seized," within the meaning of the Fourth Amendment, at any time during the period in which she sat in her car in the bank parking lot and spoke with the police officers, since she was neither stopped nor detained. As Mr. Justice White observed in *Terry* v. *Ohio*, *supra*, 392 U.S. at 34 (concurring opinion), "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." She was free to discontinue the questioning at any time, and indeed she eventually did. Because Evans was not yet in custody, the police were not required to precede their questions with *Miranda* warnings, and *Dunaway* is simply inapplicable. Accordingly, neither Evans' Fourth nor her Fifth Amendment rights were violated in the bank parking lot.

c. When petitioner Evans was brought into the bank and pretended at first, in response to petitioner Thevis's leading remark, that she was his sister—a story in conflict with her series of inconsistent explanations given the officers in the parking lot concerning her relationship to Thevis—she added to the suspicious set of circumstances surrounding Thevis's attempted withdrawal of funds from the bank and, as

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knew the Mebane town manager, since Thevis had not first been given *Miranda* warnings. Contrary to petitioner's contention (Pet. 9), these two rulings of the district court are entirely compatible.

the district court correctly held, provided the officers with probable cause to believe that Thevis and Evans were collaborating in a scheme to defraud the real Arby J. Evans of $86,000. Hence, the continuation of petitioners' detention after the time that Evans was brought into the bank was permissible under the Fourth Amendment.

2. Finally, petitioners complain that the legality of the various searches should have been considered in conjunction with the legality of their detentions. Once again, we note that the fruit of the poisonous tree doctrine (see *Brown* v. *Illinois*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 471 (1963)) is applicable only where there is a poisonous tree. Because the detentions were lawful, there was no reason to decide whether the searches were the fruits of those detentions.

Petitioners also apparently contend (Pet. 13) that some of their statements that were ruled inadmissible were nevertheless used to support a finding that the various searches for physical evidence under the search warrant were based on probable cause. They fail to document this claim. In any event, in reviewing the affidavits underlying the various search warrants, the district court excluded information obtained in violation of petitioners' constitutional rights, but nevertheless found that the remaining information in the affidavits was sufficient to establish probable cause. 469 F. Supp. at 511 n.17. For example, the affidavit in support of the warrant authorizing the search of the Chevrolet stated (*id.* at 510):

> * * * that Thevis had been apprehended as an escaped federal prisoner; that he was wanted in Georgia on two counts of murder and four counts of obstruction of justice; that Evans was seated in the car in the bank parking lot; that Thevis had told [Agent Foster] that there was half a million dollars in cash and a million and a half dollars' worth of jewelry in the car; and that Thevis had told a fellow prisoner that he was planning to flee the country with the help of Evans, who would provide him with money, false identification and a false passport.

None of the above information was obtained in violation of either petitioner's constitutional rights; yet certainly those statements provided the magistrate with probable cause to believe that evidence of a crime would be found in the car. In short, none of the physical evidence was seized in violation of petitioners' Fourth or Fifth Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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